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ALABAMA COURT OF THE JUDICIARY  
Nathan P. Wilson  
Secretary

**BEFORE THE ALABAMA COURT OF THE JUDICIARY**

In re	*
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STATE OF ALABAMA JUDICIAL INQUIRY COMMISSION	*
	*
	*
v.	*
	*
THE HONORABLE TRACIE A. TODD	*
CIRCUIT JUDGE, BIRMINGHAM DIVISION,	*
CRIMINAL DIVISION, JEFFERSON COUNTY, ALABAMA	*

**Case 61**

**REPLY TO COMMISSION’S RESPONSE IN  
OPPOSITION**

Comes now Judge Tracie A. Todd, by and through counsel, and respectfully replies to the Commission’s February 25, 2022 Response in Opposition (“Opp.”). The Commission’s objection is without any merit. First, the Commission’s response wrongly presents a cramped reading of the law designed to reduce this Court’s authority. This Court *is* permitted to hear post-hearing motions concerning the scope of the sanction. Indeed, the Commission itself has filed such motions with the Court in previous cases. Nor is Judge Todd’s motion time-barred by the Alabama Rules, which permit the motion both under Rules of Civil Procedure 59(e) *and* 60(b). Second, the merits support Judge Todd’s request that this Court exercise its equitable authority to amend her sanction to 90 days of suspension from 120 days, given the needs of her fellow judges and the community and the fact that Judge Todd has completed 6.5 Ethics CLE hours when – omitted by the Commission in its Opposition – she is required to complete only 1 hour per year.

In further support of her Motion, through this Reply, Judge Todd provides the following, through counsel, on information and belief:

**A. The Commission is wrong when it contends that this Court lacks jurisdiction to hear Judge Todd's motion.**

The Commission's first argument is that the Court of the Judiciary ("COJ") lacks jurisdiction to hear Judge Todd's motion pursuant to the Court of the Judiciary Rules. The Commission cites no authority for its threadbare argument because no authority from the Alabama Supreme Court supports it. This issue has come before this Court before, and the Commission's position depends on its litigation posture. When the Commission is the party seeking a change to the Court's decision, the Commission eschews the argument and allows for jurisdiction.<sup>1</sup> The Commission only makes the no-jurisdiction argument when it is the party objecting to a change in the Court's sanction, as here. Regardless of the Commission's inconsistency, this Court has consistently maintained jurisdiction and considered the merits of motions concerning the content of its decisions.<sup>2</sup> Nor would it make sense for the Court to defer jurisdiction on motions based upon new information not presented prior to the

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<sup>1</sup> See, e.g., Judicial Inquiry Commission's Motion for Clarification, or in the Alternative, Motion for Taxing Costs, *In the Matter of Tracie Todd, Circuit Judge, Birmingham Division Criminal Division, Jefferson County, AL*, COJ No. 58 (Dec. 14, 2021); The Judicial Inquiry Commission's Motion to Alter the Final Judgment as to Costs, *In re Anita Kelly, Circuit Judge, 15<sup>th</sup> Judicial Circuit*, COJ No. 50 (June 6, 2018).

<sup>2</sup> See, e.g., Order on the Commission's Motion for Clarification or, in the alternative, Motion for Taxing Costs, *In the Matter of Tracie Todd, Circuit Judge, Birmingham Division Criminal Division, Jefferson County, AL*, COJ No. 58 (Dec. 15, 2021) (taking jurisdiction over motion and denying it on its merits); Order, *In the Matter of Nakita Blocton Circuit Judge Jefferson County, AL*, COJ No. 60 (Feb. 11, 2022) (not deciding jurisdiction but denying motion on its substantive merits).

decision to the Supreme Court on appeal as the Supreme Court would not have jurisdiction to hear a claim unpreserved before the trial court. Thus, the Court should continue to pass on the Commission's mis-invitation, made in contradiction of the clear rule that the Alabama Rules of Civil Procedure apply to COJ proceedings, to limit its own authority. Rather, the Court properly considers the merits of Judge Todd's motion before it.

**B. The Commission is incorrect that the Court cannot and should not consider Judge Todd's motion given when it was filed.**

The Commission next cites Alabama Rule of Civil Procedure 59(e) for the proposition that Judge Todd's motion is untimely filed and that the Court therefore may not consider it. While the Commission was perhaps confounded by the clumsy titling of Judge Todd's motion, Judge Todd did not cite Rule 59(e) in the motion. This Court entered a judgment that Judge Todd violated Canon 1, and this Court then issued a sanction for that violation. In the Court of the Judiciary, judgments and sanctions are different aspects of the decision. The "judgment" pertains to the clear-and-convincing-evidence finding of guilt/no guilt, whereas the sanction is the punishment imposed. *Compare Jinks v. Ala. Jud. Inquiry Comm'n*, No. 1210133, 2022 Ala. LEXIS 103 at \*\* 6, 10-11, 2022 WL 12183411 (Ala. Oct. 21, 2022) ("the COJ ... entered a unanimous judgment finding in part", "in reviewing an appeal from a judgment of the Court of the Judiciary finding the judge guilty of the charges against him or her") *with id.* at \*\*30, 33 ("A 'decision' of the COJ necessarily includes a finding that the judgment committed a violation *and* the imposition of a sanction" (emphasis

added), equating “the sanctions” with “Sentence”). Judge Todd’ motion was thus not one limited by Rule 59 and need not meet the Rule 59(e) deadlines.

In any event, even if construed as a Rule 59(e) motion as framed by the Commission, a Rule 59(e) motion filed “31 [or more] days after entry of judgment,” “must be considered a Rule 60(b)(1), A.R.Civ.P. motion.” *Dillard v. Southern States Ford, Inc.*, 541 So.2d 483, 485 (Ala. 1989); see *Larkin v. Am. Western Ins. Co.*, 979 So. 2d 835, 838 (Ala. Civ. App. 2007) (same – motions to amend filed outside the Rule 59(e) time period are treated as Rule 60(b) motions). Alabama’s rule “follows Federal Rule 59 very closely.” Committee Comments on 1973 Adoption, Ala. R. Civ. P. 59; and federal courts too have jurisdiction to hear motions submitted after the Rule 59 deadline. See, e.g., *Adair v. England*, 209 F.R.D. 1 at \*3 (D.D.C. 2002). This Court has jurisdiction to hear motions such as Judge Todd’s under Rule 60(b).

“On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceedings for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect ... or (6) any other reason justifying relief from the operation of the judgment.” Ala. R. Civ. P. 60(b). Here, Judge Todd’s legal representatives filed the motion to amend the sanction period after allowing the notice of appeal deadline to pass in order to demonstrate good faith acceptance and confidence in this Court’s October 18, 2022 decision and to allow Judge Todd the opportunity to participate and complete as many Ethics CLE hours as she could. Any mistake is certainly excusable neglect, particularly given that there is zero prejudice to the Commission or any third party. To the contrary, this

Court, the Commission, and third parties such as the public and other members of the Birmingham Circuit Court benefit by the delay and the expressions of respect for and positive reactions to the Court's decision.

Judge Todd's motion is timely and properly made. "The motion shall be made within a reasonable time ... not more than four (4) months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of the judgment or suspend its operation." Ala. R. Civ. P. 60(b).<sup>3</sup> Judge Todd understood that the judgment is final,<sup>4</sup> that its operation is in effect, and that her motion was timely made to inform the Court of the new information and to have sufficient time for the Court to provide the relief requested. Therefore, this Court has the jurisdiction and discretion to consider the merits of the motion. *Woodward v. State ex rel. Woodward*, 664 So. 2d 211, 211 (Ala. Civ. App. 1994) (trial courts exercise discretion in consideration of Rule 60(b) motions).

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<sup>3</sup> The Commission's citation to *Holman v. State Dep't of Indus. Rels.*, 668 So. 2d 817, 818 (Ala. Civ. App. 1995) steers the Court in the wrong direction through what must be negligent excising of quotations from the case itself. The proper quotation is "there is no 'good cause' exception based upon equity to a timely unemployment compensation appeal," *id.* Because Judge Todd's motion is nothing like an unemployment compensation appeal and *Holman* does not even reference either Rule 59 or Rule 60(b), the citation is, at best, chaff to confuse and distract.

<sup>4</sup> In contrast, a Rule 59(e) motion extends the time in which a notice of appeal needs to be filed. Judge Todd did not want to convey an any message that she was delaying the finality of this Court's judgment.

**C. The Court should exercise its discretion and grant Judge Todd's request that the sanction is amended from 120 days of suspension to 90 days of suspension.**

Finally, the Commission objects to an amendment of the suspension from 120 days to 90 days. The Commission provides no reason why those extra 30 days are so consequential other than, as an adversarial litigant, seeking maximum punishment. This Court's job is not to sanction for punishment's sake but to fashion a sanction that both meets the violation and, upon the judge's being properly chastened by the finding of the Canon violation, looks forward to the impact of the sanction on the fair and efficient administration of justice after the judge's return to full service.

The Commission seems to miss the point with regard to Judge Todd's completion of CLE. It is not that she has "simply" completed 8 hours and that any COJ member or Judge Todd needs a reminder that she has CLE requirements. *See Opp.* at 5. As the Commission should know because it cited the remainder of the relevant rule and only left out the portion related to ethics CLE requirements, Judge Todd is only required to complete 1 hour of Ethics CLE. She has gone above-and-beyond a refresher, emphasizing dedication to ethics as a result of her trial: Judge Todd has completed 6.5 hours of Ethics CLE – or 650 times the amount that she is required. *See Rules for Mandatory Continuing Education for Supreme Court Justices, Appellate Court Judges, Circuit Court Judges, and District Court Judges of Alabama, Rule 1(a)* ("a minimum of 12 hours of approved continuing judicial education, 1 hour of which shall be on the subject of ethics").

Although the Commission appears to want to look backward, this Court should observe and credit the mitigating efforts made by Judge Todd and look forward this Court's abilities to minimize further disruption on the Birmingham Circuit Court Criminal Division and to return Judge Todd to rotation next month after 3 months of unpaid suspension with the expedition of case transfers. This Court knows not to have a sanction exceed what is sufficient to serve its point and not to harm or inconvenience third parties where unnecessary – an amendment to a 90 days suspension is the correct sanction in this case, post-decision events demonstrate that greater time is excessive.

For these reasons, those presented in her motion, and any others that are just and equitable, Judge Todd replies to the Commission in support of her motion that this Court GRANT this Motion and AMEND her suspension to a term of 90 days from the Court's October 18, 2022 Final Judgment.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I hereby certify that I have on this 28th day of November, 2022 electronically filed the foregoing with the Court of the Judiciary, and that I have further served a copy by sending the same via email, and properly addressed as follows:

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